

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>MICHAEL STRIGHMAN</b>	:	<b>CIVIL ACTION</b>
<b>a.k.a. Michael Striganavicz</b>	:	
<b>Petitioner</b>	:	
	:	
<b>v.</b>	:	
	:	
<b>DONALD T. VAUGHN <u>et al.</u></b>	:	<b>No. 03-317</b>
<b>Respondents.</b>	:	

**MEMORANDUM AND ORDER**

**Norma L. Shapiro**

**December 22, 2003**

Petitioner, Michael Strighman, has filed timely objections to the Report and Recommendation issued by Magistrate Judge Linda K. Caracappa on August 8, 2003. Strighman v. Vaughan, No. 03-0317 (E.D. Pa. Aug. 8, 2003) (Report and Recommendation) ("R & R"). The court conducts de novo review of the portions of a magistrate judge's R & R to which specific objections have been filed. 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72(b).

**Background**

On March 10, 1994, following a jury trial, Strighman was convicted of robbery, conspiracy, and several firearm charges in the Court of Common Pleas of Philadelphia. He was sentenced to an aggregate term of imprisonment of thirty to sixty years. Strighman appealed to the Pennsylvania Superior Court, which affirmed the judgment of sentence on September 16, 1997. Commonwealth v. Strighman, 704 A.2d 166 (Pa. Super. 1997). The Supreme Court of Pennsylvania denied allocatur on May 18, 1998. Commonwealth v. Strighman, 719 A.2d 746

(Pa. 1998).

On April 6, 1999, Strighman filed a pro se petition for collateral relief pursuant to the Post Conviction Relief Act (“PCRA”), 42 Pa.C.S. §9541, et seq. Appointed counsel filed a “no merit” letter on February 2, 2000 and a revised “no merit” letter on March 28, 2000, in accordance with Commonwealth v. Finley, 550 A.2d 213 (Pa. Super. 1988).<sup>1</sup> The trial court granted counsel’s request to withdraw, and dismissed the petition. Petitioner appealed this dismissal to the Superior Court, which affirmed in a memorandum opinion dated August 14, 2001. Commonwealth v. Striganavicz, 785 A.2d 1035 (Pa. Super. 2001). The Pennsylvania Supreme Court again denied allocatur on January 15, 2002. Commonwealth v. Striganavicz, 793 A.2d 907 (Pa. 2002).

On January 23, 2003, Strighman filed the instant federal petition for a writ of habeas corpus. The petition was referred to Magistrate Judge Linda K. Caracappa. In her R & R, dated August 8, 2003, Judge Caracappa’s found Strighman failed to meet the one-year statute of limitations for habeas petitions under the Antiterrorism and Effective Death Penalty Act (“AEDPA”) 28 U.S.C. §2244. R & R at 6. Judge Caracappa recommended that because Strighman’s petition failed to meet the criteria for statutory or equitable tolling; the petition be dismissed as untimely. R&R at 7.

On November 4, 2003,<sup>2</sup> Strighman, filing objections to the R & R, claimed that Judge

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<sup>1</sup>Under Commonwealth v. Finley, 550 A.2d 213 (Pa. 1988), a “no merit” letter is filed when a PCRA petitioner’s counsel determines that the case contains no issue of arguable merit; this letter is commonly referred to as a “Finley letter.”

<sup>2</sup>Strighman filed two motions for enlargement of time to file objections, both of which were granted.

Caracappa improperly found his petition procedurally barred. While conceding the procedural history as recited in the R&R, Strighman alleges Judge Caracappa erred in her conclusion that he failed to meet the criteria for tolling of the statute of limitations under AEDPA. He alleges his petition is timely under 28 U.S.C. §2244(d)(1)(D): “the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.” He contends the statute of limitations should have been tolled from the date his conviction became final, March 10, 1994, until April 6, 1999, the date he filed his pro se state habeas petition pursuant to the Post Conviction Relief Act (“PCRA”), 42 Pa.C.S. §9541, et seq. (Strighman’s conviction actually did not become final until August 16, 1998, the date the time to seek certiorari from the Pennsylvania Supreme Court expired.) He asserts that because of ineffective assistance of counsel by the appointed counsel in his state habeas petition, principles of statutory and equitable tolling should make April 6, 1999 the appropriate start date for the statute of limitations.

### **Discussion**

Under AEDPA, 28 U.S.C. §2244(d)(1), a one year period of limitation applies to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of:

- (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
- (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States I removed, if the applicant was prevented from filing by such State action;
- (C) the date on which the constitutional right asserted was initially recognized by the

Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence. 28 U.S.C. §2244(d)(1).

Two exceptions to the one-year time limitation apply. Under AEDPA, the limitations period is tolled while "a properly filed application for State post- conviction relief or other collateral review with respect to the pertinent judgment or claim is pending . . . ." 28 U.S.C. § 2244(d)(2).

In addition, equitable tolling, a judicially crafted exception is sometimes applied. Jones v. Morton, 195 F.3d 153, 158 (3d Cir. 1999).

Judge Caracappa , noting Strighman's conviction became final on August 16, 1998, the date petitioner's time to seek certiorari from the Pennsylvania Supreme Court expired, correctly found Strighman had until August 15, 1999 to file a timely habeas petition. Kapral v. United States, 166 F.3d 565, 575 (3d Cir. 1999) (judgment becomes final at the conclusion of direct review or the expiration of time for filing such review, including the time for filing a petition for writ of certiorari in the United States Supreme Court). On April 6, 1999, however, after 233 days of the one year AEDPA limitation period had expired, petitioner filed a PCRA petition which effectively tolled the limitation period while it was pending. 28 U.S.C. §2244(d)(2). Thus, the limitations period tolled from April 6, 1999 until January 15, 2002 when the Pennsylvania Supreme Court denied allocatur. The limitation period resumed running on January 15, 2002; with 132 days remaining in the period, May 27, 2002 would have been the last date in which Strighman could timely file a habeas petition. Strighman did not file this petition until January 23, 2003, nearly eight months after the statute of limitations expired. Strighman failed to comply with the one year limitation period and statutory tolling does not make this petition timely.

Strighman objects that Judge Caracappa misconstrued the run date of the limitation period. Pursuant to 28 U.S.C. §2244(d)(1)(D), he contends that the factual predicate of his claim did not arise until his appointed counsel failed to litigate effectively his state habeas petition. He believes the appropriate run date is April 6, 1999, the date he filed his pro se PCRA petition, because he could not have been aware of the ineffective representation until the PCRA petition was filed and the alleged ineffective representation occurred. However, the instant federal habeas petition only claims ineffective assistance of trial counsel in his direct appeal. Strighman's petition makes no allegations about the performance of his appointed counsel in his PCRA petition. Further, when a Finley letter is filed, ineffective assistance of PCRA counsel is usually not an independent ground for federal habeas relief, see, e.g. Sheaffer v. Chesney, 2003 U.S. Dist. LEXIS 15559 (E.D. Pa. 2003). The factual predicate of Strighman's claims of ineffective assistance of trial counsel in his direct appeal arose on August 16, 1998 when his conviction became final.

Further, Strighman objects that Judge Caracappa improperly found equitable tolling did not apply. Equitable tolling is proper only when the "principles of equity would make [the] rigid application [of a limitation period] unfair. Miller v. New Jersey State Dept. Of Corrections, 145 F.3d 616, 618, (3d Cir. 1998). It is well-established AEDPA's one year filing requirement is equitably tolled only in extraordinary circumstances. Fahy v. Horn, 240 F.3d 239, 244 (3d Cir. 2001), cert denied, 534 U.S. 944 (2001). The Fahy court enumerated three circumstances permitting equitable tolling:

if (1) the defendant has actively misled the plaintiff, (2) if the plaintiff has in some extraordinary way been prevented from asserting his rights, or (3) if the plaintiff has timely asserted his rights mistakenly in the wrong forum. Id., at 244, citing Jones v.

Morton, 195 F.3d 153, 159 (3d Cir. 1999) (citations omitted).<sup>3</sup>

Mere excusable neglect is not sufficient to warrant equitable tolling. Jones v. Morton, 195 F.3d at 159, quoting Miller v. New Jersey State Dep't of Corrections, 145 F.3d 616, 618 (3d Cir. 1998).

Strighman contends that his PCRA counsel provided ineffective assistance by allegedly failing to interview his client and fully investigate his claims, and also improperly withdrawing from his case. Although a criminal defendant does not have a federal constitutional right to counsel in post-conviction proceedings, Coleman v. Thompson, 501 U.S. 722, 725 (1991), the Pennsylvania Supreme Court has interpreted the Rules of Criminal Procedure to require effective post-conviction counsel. Commonwealth v. Albrecht, 720 A.2d 693, 700 (1998) (interpreting Pa. R. Crim. P. 904 to permit denial of post-conviction relief only when petitioner was afforded the assistance of counsel). However, after Strighman's PCRA counsel concluded there was no merit to petitioner's case and filed a Finley letter, the lower court permitted counsel to withdraw . It is well established that a petitioner is not deprived of his right to effective counsel where the court allows counsel to withdraw in this manner. See Commonwealth v. Peterson, 2000 PA Super 201, 756 A.2d 687, 689 (Pa. Super. Ct. 2000); Commonwealth v. Keys, 397 Pa. Super. 453, 580 A.2d 386, 387 (Pa. Super. Ct. 1990).

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<sup>3</sup>The circumstances warranting equitable tolling are usually reserved for capital cases. Merritt v. Blaine, 326 F.3d 157, 169 (3d Cir. 2003) ("Because the consequences are so grave and the applicable law is so confounding and unsettled, a court must allow less than "extraordinary" circumstances to trigger equitable tolling of the statute of limitations.") (emphasis added). In the instant action, as in Merritt, the petitioner does not face the death penalty.

Strighman has not alleged any extraordinary circumstances warranting equitable tolling under the standard articulated in Fahy, 240 F.3d at 244. Despite his extreme dissatisfaction with the performance of his PCRA lawyer, he has not demonstrated any reason why the PCRA lawyer's performance caused him to file his federal habeas petition eight months late. Equitable tolling does not apply.

### Conclusion

For the reasons stated above, and in the R & R, the petition for writ of habeas corpus is dismissed as time-barred.

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<b>Respondents.</b>	:	

**ORDER**

**Norma L. Shapiro**

**December 22, 2003**

AND NOW, this 22nd day of December, 2003, upon careful and independent consideration of the Petition for Writ of Habeas Corpus filed pursuant to 28 U.S.C. §2254, the Response of the District Attorney of Philadelphia, and on review of the Report and Recommendation of United States Magistrate Judge Linda K. Caracappa and petitioner's objections thereto, it is hereby ORDERED that:

1. The Report is APPROVED;
2. The Recommendation is ADOPTED;
3. The Petition for Writ of Habeas Corpus is DISMISSED as time-barred;
4. A certificate of appealability will not issue.

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Norma L. Shapiro, S.J.